SUPREME COURT, U.S.
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CASE NO.: 94-1579

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

The People &c. ex rel.
Charles E. Collins, III,
on behalf of
Charles Shufelt,
Petitioner,

v.

W. Dennis Duggan,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITIONER'S REPLY BRIEF

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Dated June 1, 1995

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The State's arguments on behalf of Judge Duggan highlight why this Court should grant the petition.

First, the State admits that Mr Shufelt was tried, convicted and sentenced to jail in a secret court proceeding pursuant to state statute; that he was

denied his right to a jury trial pursuant to state statute; and that the trial held to determine whether Mr Shufelt was in willful violation of a court order and to have him sentenced to jail were based upon determinations of a person who is not even a judge.

Second, the State has refused to address the constitutionality of Family Court Act §§ 433, 435 and 439 as required by law and as such Mr Shufelt has been illegally imprisoned for sixteen weekends.

Third, the State has deliberately ignored state statute in arguing Mr Collins' right to file the writ of habeus corpus.

POINT ONE

Petitioner Collins has a sufficient legal interest to support a petition for writ of habeus corpus on behalf of detainee Shufelt or to file a petition pro se in this matter.

Mr Collins filed the writ of habeus corpus, pro se, on behalf of Mr Shufelt pursuant to New York State

Civil Practice Law and Rules § 7002. CPLR § 7002 states:

> (c) Content. The petition shall be verified and shall state, or shall be accompanied by an affidavit which shall state,
>
> 1. that the person in whose behalf the petition is made is detained, naming the person by whom he is detained and the place of detention if they are known, or describing them if they are not known; where the detention is by virtue of a mandate, a copy of it shall be annexed to the petition, or sufficient reason why a copy could not be obtained shall be stated;
>
> 2. the cause or pretence of the detention, according to the best knowledge and belief of the petitioner;
>
> 3. that a court or judge of the United States does not have exclusive jurisdiction to order him released;
>
> 4. if the writ is sought because of an illegal detention, the nature of the illegality;
>
> 5. whether any appeal has been taken from any order by virtue of which the person is detained, and if so, the result;
>
> 6. the date, and the court or judge to whom

made, of every previous application for the writ, the disposition of each such application and of any appeal taken, and the new facts, if any, presented in the petition that were not presented in any previous application; and

7. if the petition is made to a county judge outside the county in which the person is detained, the facts which authorize such judge to act.

Mr Collins does not even have to know the person or the name of the person, but merely has to describe the person pursuant to the state statute. The State in its Opposition Brief is relying upon federal law concerning who may file a writ of habeus corpus in federal court. Here we are dealing with a state court writ of habeus corpus and therefore, the state procedures concerning the writ of habeus corpus are applicable and not federal court procedures.

CPLR § 7002 does not require that Mr Collins provide evidence that Mr Shufelt ever sought or authorized his representation by Mr Collins nor does

it require that Mr Collins show a special relationship to Mr Shufelt as argued by the State (Opposition Brief p. 4, 5). Mr Collins complied with what was required to be contained in the writ of habeus corpus as required by CPLR § 7002 (c)(1) thru (c)(7). The State has provided *no state* case law to support their argument concerning Mr Collins filing the writ of habeus corpus on behalf of Mr Shufelt in a state court proceeding. Therefore, their argument is without merit.

On October 7, 1994, Family Court Judge W. Dennis Duggan, referring to Mr Shufelt's willful violation of earlier orders, issued an order pursuant to Family Court Act § 454(3)(a) requiring Mr Shufelt to be committed to the Albany County Jail for a term of 16 consecutive weekends from Friday at 6:00 p.m. to Sunday at 6:00 p.m., commencing October 7, 1994

(Petition, Exh 4, p 1).

The State in its brief (p 2) states that "the petition erroniously named Judge Duggan, who was at no time Shufelt's custodian, as a respondent in this matter. *See*, New York Civil Practice Law and Rules § 7004(b) (petition should name as respondent the person having custody of the person detained).

The courts have consistently held that pro se litigants should not be held to the same technical standards as attorneys if allegations provide for relief on any possible theory *(Tyler v. Ryan*, 419 F.Supp 905 (D.C.Mo. 1976); *Canty v. City of Richmond, Virginia, Police Dept.*, 383 F.Supp 1396, affirmed 526 F.2d 587, *cert. denied* 423 U.S. 1062).

Here we have the State of New York asking this Court to dismiss this petition because there was a technical mistake in the pleading as the wrong per-

son was named. Judge Duggan participated in and violated Mr Shufelt's constitutional right to a public trial, a jury trial when he was found in willful violation of a court order and sentenced to jail in a closed court proceeding. A closed court proceeding is a secret proceeding. The State wants this Court to hold Mr Collins to technical standards of pleadings while the State deliberately violates litigants' constitutional rights to public and jury trials. The State of New York wants to cover up the fact that we are now back to the "English Court of Star Chamber" which was abolished in 1641.

And the State's further argument that Mr Collins did not properly raise a constitutional issue worthy of the State Court's review is absurd. The United States of America was founded upon open court proceedings as enumerated *In Re Oliver*, 333 U.S. 257, 68 S.Ct.

499 (1948) which struck down a secret criminal contempt trial as violative of due process. The Supreme Court stressed that at the heart of due process clause is "[t]he traditional Anglo-American distrust for secret trials," which throughout history have been associated with "institutions [that] obviously symbolized a menace to liberty." *Id.* at 268-69, 68 S.Ct. at 505. As documented *In Re Rosahn*, 671 F.2d 690 (2d Cir. 1982) the *Oliver* case is typical of a civil contempt proceeding because of its conditional nature of the punishment (petition, pp. 10-11).

In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, (1948) this Court held:

> It is **"the law of the land" that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal.** See, *Chambers v. Florida*, 309 U.S. 227, 236, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716. The petitioner was convicted without that kind of trial.

Mr Shufelt was deprived of his liberty as he spent 16 weekends in the Albany County jail for the will violation of a family court order based upon closed court proceedings (secret trials).

Even though Mr Shufelt has served his sixteen (16) weekends in the Albany County jail the issues raised in this proceeding are not moot. *Hunt v. Murphy*, 455 U.S. 478, 102 S.Ct. 1181 (1982) held that if a controversy between the parties is capable of repetition the matter was not moot under the standard stated in *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347 (1975).

Mr Shufelt has 18 more years to go before his youngest child reaches the age of 21 and therefore has at least 18 more years to go in family court and certainly the issues of a public trial, jury trial and a competent person to try the case will be raised again

if Mr Shufelt should be held in contempt.

POINT TWO

The State has made various misstatements of law and fact in their opposition brief.

This Court has the authority to review the constitutional challenges pursuant to 28 U.S.C. Section 1257. It should be noted that the State has provided no case law or statute that would deprive this Court of jurisdiction in this matter.

Mr Collins has clearly argued that as Mr Shufelt faced imprisonment pursuant to Family Court Act § 454 he was entitled to 1) a public trial and 2) a jury trial as the potential penalty that may be imposed pursuant to Family Court Act § 454 exceeds six months in jail or a $5,000.00 fine or both.

Mr Collins' fully documented on page 20 of the petition Mr Shufelt's potential penalty pursuant to Fam. Ct. Act §454. The State in its opposition brief

refers only to Fam. Ct. Act § 454 3(a) which is the term of imprisonment not to exceed six month. This Court in *Blanton v. City of North Las Vegas, Nev.*, 489 U.S. 538, 109 S.Ct. 1289 (1989) held:

> [1] **In using the word "penalty" we do not refer solely to the maximum prison term authorized for a particular offense. A legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense.**

The State has not denied that Mr Shufelt faced the following potential punishment pursuant to Fam. Ct. Act § 454 in addition to six months in jail as documented on page 20 of petitioner's brief.

1. a judgment in the amount of $10,000.00
2. Income attached by Support Collection
3. post collateral or cash in the amount of $10,375.56
4. sequestration of his property
5. pay his ex-wife's attorney fees which could exceed $5000.00
6. sentence to six months in jail; plus another six months in jail if he was unable to pay the attorney fees or post the collateral as required
7. Probation for at least 18 years

The above potential penalty certainly exceeds six months in jail or a $5000.00 fine or both. Six months in jail plus probation for 18 years certainly exceeds a penalty of six months in jail.

The State is deliberately misleading this Court in its appendix by only providing Family Court Act § 454 (3) and (3)(a). The State deliberately left out the punishments which are required to be imposed pursuant 454 (1) and (4). To wit: 454 (2-a), (2-b), (2-c), (2-d), and (3-b) which can be found in petitioner's petition (pp. 20, 22-24).

The State in its brief on page 8 states:

> Petitioner Collins further errs in his claim that Family Court Act § 454 permits the court to impose upon a violator of a support order penalties of incarceration in excess of "six months . . . or $5,000.00 fine or both" without a jury trial (Petition, pp 21-27). Instead, that section directs the Family Court, in response to a person's willful failure to comply with a support order, to compel the violator to pay arrears and attorney fees; it also permits the court, in appropriate instances,

to jail the violator for up to six months. It is well established that this imprisonment provision does not violate the Sixth Amendment. *United States ex rel. Griffen v. Martin*, 409 F.2d 1300 (2d Cir. 1969)(imprisonment for up to six months under Family Court Act § 454 for contempt of support does not infringe upon Sixth Amendment rights); *Brooke v. Family Court of the State of New York*, 420 F.2d 296 (2d Cir 1969) , *cert denied*, 397 U.S. 1000 (1970) (same); *Baldwin v. New York*, 399 U.S. 66 (1970).

Family Court Act § 454 has been modified several times since 1969 to increase the "severity" or "seriousness" of the penalty for contempt of court for failure to pay support. The "seriousness" of the offense was increased in L. 1971, Ch. 1097; L. 1977, Ch. 516; L. 1978, Ch. 456; L. 1980, Ch. 241; L. 1982, Ch. 654; L. 1983, Ch. 746 and L. 1986, Ch. 892. Therefore, due to the changes in the severity of the punishment under section 454 of the Family Court Act since the Court of Appeals rulings in *Griffin* and *Brooke* these cases are no longer applicable and this Court should reconsider whether § 435 of the Family

Court Act violates the Sixth Amendment to the United States Constitution to a jury trial as Family Court Act § 454 is currently written. This Court must look beyond the imprisonment and look to the entire potential penalty that may be imposed and in certain cases is required to be imposed pursuant to Family Court Act § 454.

United States v. Craner, 652 F.2d 23 (1980) held that a litigant facing six months in jail or a $5,000.00 fine or both, *plus payment of costs*, was a "serious" one for which the Federal Constitution guaranteed trial by jury.

As Mr Shufelt, by the State's own admission faced six months in jail *plus* the payment of attorney fees he should be entitled to a jury trial based upon this decision.

The State in its opposition brief (page 7) states

that imprisonment for contempt for a period in excess of 15 days does not constitute confinement for a criminal offense. The State does not contradict Mr Collins' contention (petition, p. 8-10) that the Family Court in *Matter of Linda G. v. Theodore G*, 74 Misc.2d 516, 345 N.Y.S.2d 361 held that failure to pay support pursuant to a court order was a "crime" pursuant to County Law § 722-a. The State has not denied that according to the Penal Law Article 10 a "crime" is any misdemeanor or felony and that the definition of a misdemeanor is a term of imprisonment for a term not less than 15 days and not more than 1 year.

The State admits on pages 7 and 8 that Mr Shufelt did not receive a public trial and then takes the position that "there is no contention that Mr Shufelt even requested that his contempt proceeding

be open to the public".

The State states on page 7:

> Petitioner Collins errs in his assertion that confinement for contempt following a hearing which may be held as a closed proceeding pursuant to Family Court Act § 433 constitutes "sentenc[ing] to jail in a secret trial (Petition, pp 10, 11-18). Contrary to petitioner's suggestion, section 433 neither considers nor establishes the propriety of exclusion of the public from a contempt proceeding over the contemnor's objection. Instead, that section merely declares that the public may be excluded from the Family Court support proceeding in a proper case. . . .

The family court was closed to the public during Mr Shufelt's trial on the contempt charge and when he was sentenced to jail for sixteen weekends. The State has provided no documentation that the judge issued a finding before closing the court to the public as required by the Uniform Rules for the Family Court § 205.4 - Access to Family Court proceedings (22 NYCRR § 205.4). The State also fails to define what a "proper case" is to close the court. In a "proper

case" the court should be open until there is a public hearing to close the court and the judge issues a finding as to why the court should be closed as required by law. The State has provided no case law that holds that a litigant facing imprisonment must demand their constitutional right to a public trial before they are tried, convicted and sentenced to jail. All persons facing imprisonment are entitled to public trials. There are no exceptions.

The Court was summarily closed to the public pursuant to Family Court Act § 433 in a proceeding in which Mr Shufelt was tried and convicted of a willful violation of failure to pay child support pursuant to a court order and was sentenced to jail for sixteen weekends. Therefore, § 433 of the Family Court Act is unconstitutional as it is written and/or as it is being applied.

Concerning the office of the hearing examiner and the constitutionality of Family Court Act § 439. The State states "Nothing in the State Constitution bars the appointment of hearing examiners for Family Court proceedings. In any case this claim improperly invokes this Court's jurisdiction to assert rights purportedly derived for the State Constitution rather than the Federal Constitution."

§13. [Family court established; composition; election and appointment of judges; jurisdiction]

a. The family court of the state of New York is hereby established. It shall consist of at **least one judge** in each county outside the city of New York and **such number of additional judges** for such counties as may be provided by law. Within the city of New York it shall **consist of such number of judges** as may be provided by law. The judges of the family court within the city of New York shall be residents of such city and shall be appointed by the mayor of the city of New York for terms of ten years. The judges of the family court outside the city of New York shall be chosen by

> the electors of the counties wherein they reside for terms of ten years.

The New York State Constitution Article VI, § 13 states the composition of the family court. It authorizes the election of judges outside the city of New York and the appointment of judges within the city of New York. It does not authorize the appointment or election of hearing examiners in family court to determine any issue including the issues of support or contempt.

The State on p. 9 of its brief states:

> . . . Family Court Act § 439(f) plainly provides for the selection of qualified hearing examiners for the Family Courts; section 439(a) empowers such examiners to conduct hearing and to make and grant any relief under Article 4.

Mr Collins in his petition (pp 28-31) has clearly documented that the Legislature is not authorized to change the composition of the family court without amending the State Constitution. The Legislature by

enacting Family Court Act § 439 which employers family court hearing examiners to determine support and contempt proceedings changes the composition of the family court without amending the State Constitution and is therefore, unconstitutional.

More importantly, Family Court Act § 439 deprived Mr Shufelt of his right to a duly elected family court judge pursuant to the New York State Constitution, Article VI, § 13 and thereby deprived him of due process under the Fourteenth Amendment as it was a non-judicial employee of the Unified Court System who held the trial and then determined that Mr Shufelt had willfully violated the order of the Family Court. Whether or not a family court judge has the authority to review the determinations of the hearing examiner is not relevant. The fact is that it was the determinations of a non-judi-

cial employee, and not a judge, who determined that Mr Shufelt had violated the family court order and who presided over the trial deprived Mr Shufelt of his right to due process as guaranteed by the Fourteenth Amendment.

Rooker v. Fedelity Trust Co., 263 U.S. 413 (1923) held:

> If the constitutional questions stated in the bill actually arose in the cause, it was the province and the duty of the state courts to decide them;.

The New York State courts have refused to decide the constitutionality of these statutes when they were required to do so by law and thereby have deprived Mr Shufelt of due process and equal protection of the law as required by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: Troy, New York
June 1, 1995

Respectfully submitted,

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